SUPREME COURT, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-201

NEIL KAMERLING, RICHARD CANTELLO,
EDWARD MORAN, and JOSEPH J. ANASTASIO,

Petitioners,

—against—

JOHN T. O'HAGAN, Fire Commissioner,
City of New York,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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The petitioners Neil Kamerling, Richard Cantello, Edward Moran, and Joseph Anastasio respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit rendered March 18, 1975.

Citations to Opinions Below

The opinion of the Court of Appeals is reported at 512 F.2d 443, and appears in the Appendix. The opinion of the District Court for the Eastern District of New York is not reported and appears in the Appendix.

Jurisdiction

The judgment of the Court of Appeals was made on March 18, 1975. On June 10, 1975, Hon. Thurgood Marshall granted the application of petitioners to extend the time to file this petition and extended the time until August 15, 1975. This Court's jurisdiction is invoked under 28 USC §1254 (1).

Question Presented

Can a municipal fire department constitutionally regulate the length of hair and the wearing of beards and mustaches by firemen upon a mere representation that the regulation is related to a purpose of health and safety?

Regulations Involved

The regulation at issue here appears in the margin of the decision of the Court of Appeals, App. p. 2A-3A.

Statement of the Case

The present action was brought in the District Court for the Eastern District of New York (Hon. Mark A. Constantino) by active duty firefighters in the New York City Fire Department, against the defendant John T. O'Hagan, Commissioner of the New York City Fire Department. The case is a civil rights action under 42 U.S.C.§1938 for declaratory and injunctive relief against the operation of hair and beard regulations which were issued by Commissioner O'Hagan in 1974.

Plaintiffs allege that the hair and beard regulations constitute a violation of their First and Fourteenth Amendment rights.

On July 17, 1974 temporary orders restraining the enforcement of the regulations against the plaintiffs were entered pending a hearing of the complaint. On July 24, 1974 the plaintiff's complaint was dismissed following a hearing and the temporary restraining orders were vacated by the District Court.

In its decisions the District Court pronounced the regulations to be "reasonably related" to the legitimate state interest (App. p. 8A) in safety for firemen, upon a finding that actions violating the regulations "may" increase dangers that firemen face.

The plaintiffs appealed to the Court of Appeals for the Second Circuit. In a per curiam opinion by Judges Anderson, Mulligan and Van Graafeiland that Court affirmed. The Second Circuit rejected the contention of the plaintiff firemen that the defendant had the burden of establishing a compelling state interest (App. p. 4A) and accepted the reasonable relationship test applied by the District Court. The plaintiff firemen Kamerling, Cantello, Moran and Anastasio petition for a writ of certiorari to review that decision.

This is a case in which the standard of proof was crucial, because the defendant produced an assortment of evidence which could be adequately evaluated only under the most careful scrutiny.

Fortunately, the regulation at issue here is of recent vintage, so that evidence was available of the experience of large numbers of firemen who wore beards or long hair before 1974.

The two major areas of factual controversy relate to the alleged "inflammability" of hair and the ability of firefighters with long hair or beards to obtain a seal while wearing their face masks.*

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* The evidence as to the other health justifications advanced by the respondent was even more general and condusory than that described for face masks and inflammability.

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The District Court purported to take judicial notice of the truth of the respondent's contention that hair burns (141a, 257a*). In fact the Chief of Staff of the Fire Department knew of no scientific test establishing the inflammability of hair, and of no case when a fireman's hair had burned (T.140a). Although the respondent Fire Commissioner claimed that long hair burns, he was unable to produce reports proving such inflammability (112a). In fact, the proof showed that hair singes and melts in a fire (140a, 154a-155a, 249a, 258a-259a) and there was no scientific proof that hair would flare up in any fire which was not so hot as to produce the same injury to the skin of an unbearded man. The Chief Medical Officer of the Fire Department testified that in twenty-two years, he did not know of one case of a beard burning (217a-218a). The District Judge found that no expert testimony established that long hair had ever caused any injury (259a-260a).

As against the ipse dixit of the trial court and some of the defense witnesses, there was concrete evidence that hair has no effect on safety. Fireman Collins testified that he was trapped in an engulfing fire during which he suffered

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* References to the Appendix in the Court below are in the form "_____a)".

burns only to those portions of his unclothed skin which were not covered by hair (202a-206a). Petitioner Neil Kamerling, a fireman, testified that, when his hair was approximately shoulder length, a burning ceiling fell on him and his hair singed but did not burn (151a, 154a-155a, 157a-158a). Testimony of such singeing in the absence of burning came also from petitioner Edward Moran (179a-180a) and defense witness Birmingham (245a, 249a). It is hardly necessary to add that it was not likely that those who actually did the firefighting would advance evidence which would endanger their own safety.

The pattern of testimony with respect to the seal of the gas masks was similar: conclusory testimony for the respondent, contrasted with concrete evidence to the contrary.

In its opinion, the Court of Appeals relied on the testimony of Fire Commissioner O'Hagan in his capacity as a member of the User Design Committee of the National Aeronautics and Space Administration (App. p. 5A). While NASA had tested face masks, it had never tested the "Wilson 6000" face masks used by the New York City Fire Department (108a). Similarly, reports submitted by the respondent showing a less than perfect seal for various face masks did not include the face mask used by the respondent (54a-1 through 54a-4). Commissioner O'Hagan disclaimed the validity of tests

conducted by his own office, with the masks actually used in New York City (108a-109a, 141a-142a). Those tests showed that bearded firemen passed the teargas test without leakage into the mask. Petitioner fireman Kamerling testified that he had passed such a test wearing a full beard (150a-151a) as did the witness, fireman Ulmer (191a-193a).

The evidence showed that the fire department conducts frequent "multi-unit" tests, during which firemen are tested for the seal on their face masks. The Chief of Staff called it the "best practical" test (256a). All the plaintiffs were able to get a proper seal with long hair or a beard or both as was fireman Hamill (221a). Captain Mahnken, a unit commander, had worn long hair and a beard before the regulation at issue here was promulgated. He found that it did not interfere with any aspect of firefighting. He had never had any trouble getting a seal with a face mask and none of the men under him had found that the beard interfered with the seal (226a). So many of the men under his command had hair and beards which did not comply with the regulation, that half of them had to go to the barber when it went into effect (233a).

It was stipulated that other firemen witnesses, if called, would similarly testify that they could obtain a proper seal and that their hair did not burn (189a).

One fireman witness, Birmingham, testified that he could not get a seal while wearing a beard, although he knew of other firemen who could (246a, 251a).

It ultimately developed that it may be impossible to obtain a proper seal because of the bone structure and musculature of the face (114a-115a, 241a, 136a) regardless of the presence or absence of long hair or a beard and it was conceded that the plaintiff-petitioners, at least, could get a satisfactory seal wearing a beard (167a). Even the witnesses for the respondent Fire Commissioner were not able to point to a single instance where injury had resulted from hair or a beard which would violate the present regulations.

There was evidence concerning the appropriateness of the regulations to the strict health and safety for which they were purportedly drawn. Hair is permitted by the regulations to grow down to the collar and earlobe, which is below the helmet band, even though it is claimed that hair below the helmet band may flare up. It was this which caused the District Court at one point to call the hair regulation "arbitrary" (263a). More important, even a tiny beard, such as could easily be contained within a facemask is not permitted, although sideburns trimmed to fit the facemask are permitted. Mustaches which would fit within a face mask are forbidden. Finally, the respondent Fire Commissioner testified that wide latitude is allowed

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to local commanders in the enforcement of the regulations, showing that he recognised that the aims of safety could be adequately obtained outside the confines of the regulations (91a-92a).

REASONS FOR GRANTING THE WRIT

THIS CASE PRESENTS AND CLARIFIES ISSUES SIMILAR TO THOSE IN A CASE ALREADY PENDING BEFORE THIS COURT

The courts below based their decision on Dwen v. Barry, 483 F.2d 1126 (2nd Cir. 1973) cert. granted No. 74-1269, May 27, 1975. That case concerns hair and beard regulations for policemen. Rejecting the argument that policemen should be governed by standards analagous to those of the military, the Second Circuit there established the standard applied in this case, that regulations of personal appearance "must be justified by a legitimate state interest reasonably related to the regulation" (App. p. 4A).

A decision in the present case will clarify some elements which may be left open by Dwen v. Barry. The plaintiff firemen are not accounted by the respondent to be "para-military", and no attempt is made to justify the regulation at issue upon that basis. On the other hand, the regulation is labelled "health and safety

standards", and respondent has sought to justify it upon the ground of its reasonable relationship to a legitimate state interest in health and safety. As the Chief of Staff of the Fire Department testified (260a) and the District Court held (App. p. 8A), it was not justified because of any proven or provable danger in the long hair or beard but because of a mere possibility of harm. While the regulation at issue here, and indeed any regulation, might pass muster under such a test, it is submitted that the regulation can not survive under the test applicable in cases relating to the abridgement of other fundamental rights, see e.g. United States v. O'Brien, 391 U.S. 367, 377 (1968) as cited in Breen v. Kahl, 419 F.2d 1034, 1036 (7th Cir. 1969):

> [A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

The regulation at issue here was not proven to be narrowly drawn to obtain only the state interest by the narrowest practicable means.

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If the hair and beard regulations were intended to prevent burns, then valid testing concerning the fact that hair increases the likelihood of such burns, was an indispensable element in proving that the state interest in safety is really advanced by the regulation. The mere feeling or argument of fire officials on the point was not sufficient. See Vulcan Soc. of New York Fire Department v. Civil Service Commn., 490 F.2d 387 (2nd Cir. 1973) (rejecting unvalidated civil service examinations for New York City firemen.)

The evidence itself implied various alternatives less drastic than the regulation at issue. For example, if one purpose was to assure that a proper seal was obtained with a face mask, then the regulation could have limited its prohibition to those who could not, by an objective test, obtain a seal while wearing a full beard, and require such persons to wear a beard which fit within the mask. There was no necessity to forbid full beards for those who could get a seal, or indeed to forbid any small beard which fit within the mask. Similarly, there was no need to regulate any mustache which fit within the mask.

A standard of proof requiring that the respondent actually prove that the regulation advances a compelling state interest, and does so by the narrowest means consistent with constitutional rights of the firemen, could not have been met by the

narrowest means consistent with constitutional rights of the firemen, could not have been met by the proof put forward in this case.

If the personal right recognized in Dwen v. Barry is to be effectively preserved, it is essential that a standard of proof be used which is strong enough to protect it. Such a standard of proof was not applied in this case, and a writ of certiorari should be granted to devise such a standard.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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